

11 USC § 1325(a)(5)(B)(iii)(I)
11 USC § 1325(a)(5)(B)(iii)(II)
11 USC § 1326(a)(1)(C)
11 USC § 1326(a)(2)
11 USC § 1326(b)(1)
11 USC § 1326(c)

In Re Sanchez
3/19/08

Case # 07-62144-aer13
Radcliffe

Published

Chapter 13 debtors' plan proposed to pay a creditor with a purchase money security interest in a vehicle "adequate protection" payments of \$50/mo until debtors' attorney fees were paid in full, and then \$250/mo. Creditor objected.

The court held the proposed treatment violated the "equal monthly payment" requirement of § 1325(a)(5)(B)(iii)(I). It rejected debtors' argument that pre-confirmation "adequate protection" under § 1326(a)(1)(C) could extend post-confirmation in an amount different than that proposed to pay the secured claim under § 1325(a)(5)(B). It also held that § 1326(b)(1) could be harmonized with § 1325(a)(5)(B)(iii) because the former section only required that administrative claims be paid concurrently with, rather than fully paid before, non-administrative claims.

The court noted that although its opinion could be construed to negatively impact the rate at which debtor's attorneys could be paid, creditors secured in personal property always had the option of accepting proposed stepped payments. Also, if such creditors objected to stepped payments, debtors could make more room in their plans for payment of attorney's fees by extending the payout to the creditor (and hence lowering the monthly payments), so long as the payments were "equal" and provided the creditor adequate protection, as required by § 1325(a)(5)(B)(iii)(I) & (II).

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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12) No. 07-62144-aer13
13 PAUL DeWAYNE SANCHEZ and)
DEBORAH LYNN SANCHEZ,) MEMORANDUM OPINION
14)
Debtors.)

15 This matter comes before the court on creditor World Famous
16 Auto's (WFA) objection to confirmation of the Debtors' Chapter 13 plan.
17 The matter has been briefed and is ripe for decision.

18 The facts are largely undisputed. Debtors Paul and Deborah
19 Sanchez filed their Chapter 13 petition, herein, on July 30, 2007. WFA
20 is secured in a 2000 Chevrolet pickup. Debtors concede WFA's claim is a
21 purchase money "910" claim entitled to protection under 11 U.S.C.
22 § 1325(a)'s¹ "hanging paragraph." Debtors' Amended plan dated July 30,
23 2007 proposes that Debtors make monthly payments of \$288 to the trustee,
24 along with net tax refunds received during the life of the plan. Among
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26 ¹ Unless otherwise indicated, all subsequent statutory references are to
Title 11 of the United States Code.

1 other claims, the trustee is to pay WFA's claim in full from these
2 payments. Adequate protection payments to WFA are proposed at \$50
3 monthly until attorney's fees are paid in full. Thereafter, WFA is to
4 receive monthly payments of \$250. Attorney's fees are disclosed as
5 \$3,000 with \$2,863 to be paid through the plan "concurrently with
6 adequate protection payments to secured payments [sic]." WFA objects
7 that the plan's treatment does not comply with § 1325(a)(5)(B)(iii).

8 Discussion:

9 The Bankruptcy Abuse Prevention and Consumer Protection Act of
10 2005 (BAPCPA),² codified, through several provisions in Chapter 13 of the
11 Bankruptcy Code, "adequate protection" requirements for certain types of
12 secured debt. It also added a provision dictating how periodic payments
13 on secured debt are to be paid. The interplay between these new provisions
14 is at issue here.

15 One of the provisions, § 1326(a)(1)(c), protects purchase-money
16 lenders secured in personal property. Unless the court orders otherwise,
17 it requires a debtor to begin making adequate protection payments 30 days
18 after the order for relief.³ The other provision, § 1325(a)(5)(B)(iii),

20 ² Pub. L. 109-8, April 20, 2005, 119 Stat. 23. Most of BAPCPA's
21 provisions, including those relevant to the case at bar were effective for
cases filed on or after October 17, 2005.

22 ³ Section 1326(a)(1)(C) provides:

23 Unless the court orders otherwise, the debtor shall
24 commence making payments not later than 30 days after the
date of the filing of the plan or the order for relief,
whichever is earlier, in the amount-

25 that provides adequate protection directly to a
26 creditor holding an allowed claim secured by

(continued...)

1 relates to payments on secured claims when the debtor proposes to retain
2 the collateral.⁴ It provides as follows:

3 With respect to each allowed secured claim
4 provided for by the plan-

5 if-

6 (I) property to be distributed
7 pursuant to this subsection is in the
8 form of periodic payments, such
9 payments shall be in equal monthly
10 amounts; and

11 (II) the holder of the claim is
12 secured by personal property, the
13 amount of such payments shall not be
14 less than an amount sufficient to
15 provide to the holder of such claim
16 adequate protection during the period
17 of the plan.

18 ³(...continued)

19 personal property to the extent the claim is
20 attributable to the purchase of such property
21 by the debtor for that portion of the
22 obligation that becomes due after the order for
23 relief, reducing the payments under
24 subparagraph (A) by the amount so paid and
25 providing the trustee with evidence of such
26 payment, including the amount and date of
payment.

27 This District requires pre-confirmation payments under this section to be
28 made through the trustee. LBR 3015-1.B.11. The trustee only disburses once the
29 creditor has filed a proof of claim. Unless the plan provides otherwise, the
30 amount of the payment is set out in the plan. Id.. The trustee applies these
31 pre-confirmation payments to the creditor's allowed claim. Id.; see also, plan
32 ¶ 2(b)(3).

33 ⁴ Under § 1325(a)(5), there are three ways a debtor may treat a secured
34 claim and gain confirmation. The creditor can accept the proposed treatment,
35 § 1325(a)(5)(A); the debtor can surrender the collateral, § 1325(a)(5)(C); or
36 the debtor may retain the collateral provided the creditor retains its lien
37 until the earlier of payment of the entire underlying debt or entry of the
38 debtor's discharge, § 1325(a)(5)(B)(i), and the value as of the plan's
39 effective date, of property to be distributed under the plan is not less than
40 the claim's allowed amount. § 1325(a)(5)(B)(ii). New § 1325(a)(5)(B)(iii)
41 imposes additional requirements when periodic payments of secured claims are
42 proposed.

1 One court has explained the purpose behind the statute as follows:

2 Prior to BAPCPA, it was not uncommon for some
3 Chapter 13 plans to provide for backloaded
4 payments, such as balloon payments. Another
5 form of backloading involved graduated or step-
6 up payment plans, where the payments started out
7 smaller and increased over time. Secured
8 creditors, particularly those secured by a
9 vehicle, viewed this as unfair, exposing them to
10 undue risk in light of the constant depreciation
11 of their collateral.

12 Other plans, filed by debtors whose
13 employment is seasonal, provided for reduced
14 payments or no payments at all during certain
15 months of the year, or called for payments to be
16 made quarterly or semi-annually, rather than
17 monthly, based upon the peculiarities of the
18 debtor's income stream. Secured creditors had
19 similar complaints with those plans.

20 In response to those creditor concerns,
21 Congress enacted the equal payment provision and
22 a companion provision extending the concept of
23 adequate protection, formerly a preconfirmation
24 requirement, to postconfirmation plan payments.
25 11 U.S.C. § 1325(a)(5)(B)(iii)(II). The equal
26 payment provision prevents debtors from
backloading payments to secured creditors or
paying them other than on a monthly basis.

17 In re Erwin, 376 B.R. 897, 901 (Bankr. C. D. Ill. 2007)

18 Under § 1325(a)(5)(B)(iii)(I) (**subsection (I)**), when a debtor
19 proposes to pay a secured claim in "periodic payments,"⁵ those payments
20 must be in equal monthly amounts. If the debt is secured by personal
21 property, § 1325(a)(5)(B)(iii)(II) (**subsection (II)**)⁶ requires that the

23 ⁵ The term "periodic payments" is nowhere defined in the Bankruptcy Code.
24 Here, the parties do not dispute that Debtors are attempting to pay WFA through
periodic payments.

25 ⁶ The question of whether or not Subsection (I) applies to creditors
26 secured by real property is beyond the scope of this opinion. Subsection (II)
does not apply to creditors secured by real property. Subsection (II) does,
(continued...)

1 periodic payments be sufficient to adequately protect the creditor
2 "during the period of the plan." The issue here is whether the debtors'
3 plan meets the "equal monthly payments" contemplated by
4 § 1325(a) (5) (B) (iii).

5 There is a paucity of caselaw on this subject. In the few cases
6 that have been reported, the courts are split. The slight majority view
7 appears to side with Debtors' position that "adequate protection
8 payments" may continue post-confirmation in one amount, with "equal
9 monthly payments" replacing them at a higher amount at some later time
10 during the plan. Compare, In re Hill, 2007 WL 499622 (Bankr. M.D.N.C.
11 2007); In re DeSardi, 340 B.R. 790 (Bankr. S. D. Tex. 2006); In re Erwin,
12 376 B.R. 897 (Bankr. C.D. Ill. 2007), with, In re Denton, 370 BR 441
13 (Bankr. S.D. Ga. 2007).

14 The majority view allows room, in Chapter 13 plans, to pay
15 debtors' attorneys on an expedited basis. While this court agrees that
16 this is a salutary goal, this court cannot join in the statutory
17 interpretations employed to reach this result.⁷

18 Each of the courts subscribing to the majority view reach the
19 same result by different but strained interpretations of the statute.
20 The DeSardi court views subsection (II)'s adequate protection requirement
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22 ⁶(...continued)
23 however, apply to all creditors secured by personal property, as distinguished
24 from § 1326(a) (1) (C), which only applies to creditors with purchase-money
security interests.

25 ⁷ United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.
26 Ct. 1026, 1030, 103 L. Ed.2d 290 (1989) ("where. . . the statute's language is
plain, the sole function of the courts is to enforce it according to its terms"
(internal quotation omitted)).

1 to be different from subsection (I)'s equal monthly payment requirement.
2 Here, however, interpreting the statute's plain meaning and in context,
3 it is clear that the term "such payments" appearing in both subsections
4 applies to the periodic payments that must be made "during the period of
5 the plan" and that subsections (I) and (II) are linked when the
6 collateral is personal property.

7 DeSardi also rests largely on its interpretation of
8 § 1326(b)(1). That section provides that "[b]efore or at the time of
9 each payment to creditors under the plan, there shall be paid any unpaid
10 claim of the kind specified in section 507(a)(2)"⁸ DeSardi
11 interprets this language to require full payment of attorney's fees (and
12 other administrative expenses) before "equal monthly payments" to secured
13 creditors under subsection (I) may begin. DeSardi, supra at 808. No
14 such preference, however, may be found in this District, as
15 administrative claimants may insist only on concurrent payments with,
16 rather than full payment before, non-administrative claims. See, In re
17 Ryan, 228 B.R. 746 (Bankr. D. Or. 1999) (interpreting analogous Chapter
18 12 provisions). As such, § 1326(b)(1) may be harmonized with
19 § 1325(a)(5)(B)(iii).

20 The Hill court recognized that subsections (I) and (II) are
21 linked when the collateral is personal property. The court then appears
22 to undercut this link by holding the term "during the period of the plan"
23 in subsection (II) modifies "adequate protection" not "such [periodic]
24

25 ⁸ Section 507(a)(2) gives administrative expense priority to those claims
26 described in § 503(b), including a Chapter 13 debtor's attorney's fees. See,
§ 503(b)(2) (incorporating § 330(a)(4)(B)).

1 payments" and thus "cannot be read to dictate any specific time for the
2 equal monthly payments to begin." Hill, supra 2007 WL 499622 at *6. In
3 practical terms, this interpretation de-links subsections (I) and (II).
4 Under subsection (II) adequate protection is provided only by subsection
5 (I)'s equal monthly payments. Subsection (II) then answers when this
6 protection must be provided, by requiring it "during the period of the
7 plan." The statute does not provide for equal monthly payments "during
8 part of the period of the plan" or "during some of the period of the
9 plan." This court construes "during the period of the plan" to mean
10 equal monthly payments must commence with confirmation and last until the
11 secured claim is paid.⁹

12 Curiously, after explaining the purpose behind the statute, the
13 Erwin court supra, reaches the same result as the majority. There
14 debtors' plan proposed level payments into the plan from which pro rata
15 distribution would go to secured creditors as determined by the trustee.
16 Secured creditors were receiving pre-confirmation adequate protection
17 payments paid by the trustee. The plan called for payment of the
18 debtor's attorney's fees by the trustee. A local standing order provided
19 for expedited payment of the fees, (i.e. the lesser of 50% of the funds
20 available for distribution or \$250, in any given month), which meant,
21 that as a practical matter, the payments to secured creditors would be at
22 one level while attorney's fees were being concurrently paid, then

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24 ⁹ This court agrees that monthly payments need not be made for the plan's
25 entire duration. Debtor may propose to pay secured claims before their plan
26 ends. Hill, supra 2007 WL 499622 at *6. This conclusion is buttressed by new §
1325(a)(5)(B)(i)(I) which allows the creditor to retain its lien until the
earlier of the time the entire debt is paid in full (e.g. a "910" or
oversecured claim) or when discharge is granted.

1 increased once the fees were paid in full. The court distinguished
2 between the debtor's proposals in their plan and the way the plan was
3 actually administered by the trustee, as determined by its standing order
4 and § 1326(b)(1). The court held that debtors' level payments into the
5 plan and the proposed pro rata distribution to secured creditors complied
6 with subsection (I)'s "equal monthly payment" requirement. Erwin, supra
7 at 902-3. It further held the trustee was not bound by subsection (I) in
8 administering the plan. Id. at 902. Finally, it held the increase in
9 payments, once attorney's fees were paid, was not due to debtors' plan,
10 but rather the operation of § 1326(b)(1) and the court's standing order.
11 Id. at 902-903.

12 Erwin's rationale is problematic for several reasons. Subsection
13 (I) is part of § 1325(a)(5), which expressly pertains to "allowed secured
14 claims provided for by the plan." Thus, subsection (I) refers to
15 distributions by the trustee to creditors under the plan, not the
16 debtor's payments into the plan. In re Lemieux, 347 B.R. 460, 465
17 (Bankr. D. Mass. 2006). Further, in sidestepping the "equal payment"
18 statute, Erwin reposes too much discretion in the trustee in
19 administration of the plan. Section § 1326(a)(2) requires the trustee to
20 retain plan payments until confirmation and then upon confirmation
21 distribute those payments in "accordance with the plan." Pursuant to
22 § 1326(c), except as otherwise provided in the plan or the order
23 confirming the plan, the trustee is required to make payments to
24 creditors "under the plan." These provisions indicate that a plan's
25 specific provisions trump the trustee's discretion in making payments to
26 creditors.

1 In contrast, Denton holds that "periodic payments" under
2 subsection (I) is not a defined term, but rather refers to all regularly
3 recurring post-confirmation payments on an allowed secured claim, such
4 that they all must be equal. Id. at 445 ("The word 'periodic' simply
5 describes payments that recur at regular intervals."). Thus, pre-
6 confirmation adequate protection payments under § 1326(a)(1)(C) may not
7 be extended beyond confirmation when the monthly amount is less than the
8 amount of payment on the allowed secured claim under the plan. This
9 cuts through the majority courts' distinction between post-confirmation
10 "adequate protection" and "equal monthly" payments. Under subsection (I)
11 the periodic payments are "property to be distributed pursuant to this
12 subsection." (emphasis added). "This subsection" refers to
13 § 1325(a)(5)(B)(ii) which requires that "the value, as of the effective
14 date of the plan, of property to be distributed under the plan on account
15 of such claim," be not less than the allowed amount of the secured claim.
16 (emphasis added). Denton recognizes that post-confirmation, adequate
17 protection payments would be "property . . . distributed under the plan
18 on account of the . . . [secured] claim," and not some special breed of
19 payment divorced from the claim.¹⁰ Denton's holding is further
20 buttressed by subsection (II)'s "during the period of the plan" language,
21 which as discussed above, means that equal monthly payments must start
22 with the first payment after confirmation and continue until the secured
23 claim is paid. This court agrees with the minority view as expressed by
24 the court in Denton.

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26 ¹⁰ There is no dispute that "adequate protection" payments are credited
against the secured claim.

1 Conclusion:

2 Debtors' plan does not comply with § 1325(a)(5)(B)(iii)'s "equal
3 monthly payment" requirement.¹¹ Confirmation must be denied. Debtors
4 will be given 28 days to file an amended plan or a motion to convert.
5 Absent such timely filing, this case will be dismissed without further
6 notice or hearing.

7 The above constitute the court's findings of fact and conclusions
8 of law under FRBP 7052; they shall not be separately stated.

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22 ¹¹ While this court's holding may appear to undercut the speed at which a Chapter
23 13 debtor's attorney's fees may be paid, this isn't necessarily so. The type of
24 stepped payments Debtors propose are not per se, non-confirmable. A secured creditor
25 may always accept its proposed treatment under § 1325(a)(5)(A). If the creditor
26 objects to stepped payments, debtors are not precluded from making room for payment of
attorney's fees by modifying the plan to amortize the secured claim at a lower (but
equal) monthly payment over a longer period. All that is required under
§ 1325(a)(5)(B)(iii) is that the proposed equal monthly payments pay the secured claim
and be sufficient to adequately protect the creditor's interest. Here, while WFA has
not contested that \$50 per month adequately protects its interest, that amount is
insufficient to amortize its claim, even over the maximum 60 months permitted.